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No. 04-1327

Supreme Court, U.S.
FILED
APR 20 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF *AMICUS CURIAE* OF CERTAIN PROFESSORS OF EVIDENCE LAW IN SUPPORT OF PETITIONER

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BRIEF OF PROFESSORS OF EVIDENCE LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of Professors of Evidence Law at various United States Law Schools. Petitioner Bobby Lee Holmes and Respondent the State of South Carolina have consented to the filing of this brief.

I. INTEREST OF *AMICUS CURIAE*[1]

Amici are professors of law with a particular interest in the application of state and federal rules of evidence. Their qualifications are set forth in the Appendix.

II. SUMMARY OF ARGUMENT

Petitioner was convicted of murder and sentenced to death. He proffered an abundance of evidence pointing to the guilt of another man, nearly all of which the trial court excluded. The South Carolina Supreme Court upheld the trial court's decision based on the state's applicable third-party evidence rule. The decision of the South Carolina Supreme Court cannot be squared with this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), which the South Carolina Supreme Court simply ignored. The Court should grant certiorari not only to correct the decision below, but more importantly, in order to clarify the status and scope of *Chambers*. Subsequent decisions of the Court have treated *Chambers* as establishing a generally applicable rule of law *and* as a *sui generis* exercise in error

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

correction. Such mixed signals have left the lower courts without the guidance they need in order to evaluate the constitutionality of state evidentiary rules governing the admissibility of evidence of third-party guilt and to apply those rules in a manner consistent with the Constitution.[2]

III. ARGUMENT

A. The Court Should Grant Certiorari Because The South Carolina Supreme Court, Confronted With Facts Materially Indistinguishable From Those Of *Chambers v. Mississippi*, Willfully Ignored This Court's Holding In That Case.

Petitioner Bobby Lee Holmes was arrested in December 1989 in York, South Carolina for the rape and assault of an eighty-six-year-old female victim. *State v. Holmes*, 605 S.E.2d 19, 21 (2004). The crime occurred early that morning after the perpetrator knocked on the victim's door and forced his way in. *Id.* at 20. The victim later died as a

[2] Holmes' petition for a writ of certiorari also argues that the writ should be granted because the exclusion of evidence of third-party guilt at the penalty phase violated the Eighth Amendment. Such exclusion denies a capital defendant the opportunity to present relevant mitigating evidence, thereby breaching the longstanding principle, articulated in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and its progeny, that a capital sentencer cannot "be precluded from considering, as a mitigating factor, . . . any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. *Amici* would only emphasize that excluding relevant and probative evidence of innocence, such as the evidence excluded here, unnecessarily enhances the risk of an erroneous conviction. Recent studies of exonerations in the United States have underscored the fact that the falsely convicted defendant is a "disturbingly commonplace" event. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States* (Apr. 19, 2004) (unpublished manuscript), *available at* http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf. Due process protections should therefore be at their apex when a state evidentiary rule operates to exclude such evidence.

result of the injuries sustained during the attack. *Id.* at 21. Petitioner protested his innocence from the start, insisting that he had never been inside the victim's home. *Id.* Someone else must have committed the crime. The state's case against him was circumstantial, consisting primarily of various pieces of forensic evidence linking petitioner to the crime. *Id.* at 21-22.

Petitioner's defense against the state's charges began with an effort to plant reasonable doubt concerning the state's forensic evidence of guilt. *Id.* at 22. *Every article* of physical evidence offered against petitioner – every bloodstain, every fiber, the palm print found on the victim's door, the currency found in the defendant's wallet – was tainted by a single, narrow, well-founded risk: that City of York Police Captain (and later chief) William Mobley corrupted the evidence so as to secure petitioner's conviction of this crime.

After arriving at the crime scene in the hours after the attack, Mobley directed two officers already present to leave the premises. *Id.* at 21. He then locked himself in the apartment while he finished collecting and packaging the victim's bedclothes and nightgown and other items later shown to carry stains of the victim's and (in one instance) petitioner's DNA. *Id.* Mobley dusted for fingerprints throughout the residence. Later he testified that he recovered exactly one clear print inside the apartment: a palm print, later identified as petitioner's, that Mobley said he lifted from the inside surface of the exterior door. *Id.* Mobley testified that despite extensive dusting throughout the apartment, he found no other identifiable print *even of the victim herself in her residence of many years*. (Tr. 2485, 2495.)

Later that same day, two rape kits collected from the victim at area hospitals were delivered to Mobley. (Tr. 2240.) These contained several tubes of the victim's blood. (Tr. 2530.) A blood sample drawn from petitioner, by then in custody, likewise was delivered to Mobley. (Tr. 2530.) By this time, too, Mobley had received those items of petitioner's clothing later shown to carry evidence of the victim's DNA, as well as petitioner's wallet, later shown to contain a quantity of currency consistent with what the victim said had been robbed from her. *Holmes*, 605 S.E.2d at 24.

As of the night of the crime, therefore, Mobley had in his exclusive possession *every article of physical evidence ultimately offered in this case*. Petitioner's theory of contamination required only that Mobley rub the victim's bloody clothing against petitioner's (or drip her blood onto petitioner's clothing), that he transfer fibers by rubbing petitioner's clothing against the victim's clothing and sheets, that he lift a palm print of petitioner from someplace in petitioner's jail cell or in a room where he was questioned, and that he adjust the quantity of currency in petitioner's wallet.

For none of these steps would Mobley have required great craft or any assistance. That is, petitioner did not confront the jury with a grand conspiracy to frame him or with a claim of a longstanding vendetta. He argued only that on the night of a strikingly brutal crime in a very small community, the police captain and later chief followed a low-tech route of high temptation to create seemingly potent evidence of petitioner's guilt.

Once he had cast reasonable doubt on the state's forensic evidence, petitioner planned to take the offensive,

showing that someone else – Jimmy White (White) – had actually committed the crime. *Id.* at 22-23. Accordingly, petitioner proffered at a pre-trial hearing an abundance of competent and reliable evidence designed to show that White was the one the state should have been prosecuting. *Id.* At that hearing, *four* witnesses (the proximity witnesses) stepped forward to testify that they saw White in the victim's neighborhood around the time of the crime. *Id.* For example, an eighty-seven year old neighbor of the victim testified that a stranger knocked on her door in the middle of the night saying, "[o]pen the door, my man, *this is Jimmy*, open the door." *Id.* at 22 (emphasis added). As it turned out, the jury heard none of this evidence, even though the trial court said the proximity witnesses were credible. Order re: Third Party Guilt Evidence, at 3-4.

Undeterred, petitioner next proffered *four* additional witnesses (the confession witnesses) who testified that White had made statements incriminating himself and exculpating petitioner. *Holmes*, 605 S.E.2d at 22-23. For example, Ken Rhodes testified that after asking White if the word on the street – that White was the killer – was true, White

> put his head down and he raised his head back up and he said well, you know, I like older women . . . and he never called the lady's name but you know he say that he liked old women and that yeah, he did what they say he did and you know, that somebody else was locked up for it. And you know, it's like he didn't have no regrets about it at all.

Id. at 22. In addition, Rhodes testified that "he [White] told me that he did have sex with the lady. He said but the lady didn't die. She wasn't dead when he left the house. He

said something about a hospital, she was in a hospital and she caught pneumonia and died then and now that they done put a murder rap on Bobby that he was going to burn for something that he didn't really do." Aug. 21, 2000 Hearing Tr. at 89:20-90:2 (emphasis added.)

In addition to the four confession witnesses, the defense also proffered the testimony of a receptionist at the York County Public Defender's Office who said that White had told her not only that he did not believe petitioner was guilty, but also that everyone on the street knew who had really committed the crime. *Id.* at 23. Again, the jury heard none of this evidence. The trial court excluded it, even though again finding it to be credible. Order re: Third Party Guilt Evidence, at 3-4.

White also made an appearance during the pre-trial hearing. *Holmes*, 605 S.E.2d at 23. White denied having committed the crime. *Id.* He could not have committed it, he testified, because he was at home, away from the scene of the crime, when the victim was attacked. *Id.* Although he admitted he was near the victim's neighborhood in the early morning hours before the attack, he said he had been driven home by Joshua Lytle. *Id.* But when Lytle testified, White's alibi evaporated. According to Lytle, he did not drive White home on the evening the victim was attacked. *Id.* White never took the stand at trial. The trial judge refused to permit the defense to call him as a witness. (Tr. 2685.)

In short, petitioner's defense proceeded in two steps. First, he did not assault the victim, and the state's forensic evidence suggesting otherwise was simply not to be believed because it was unreliable, having either been contaminated, or worse, fabricated. Second, and with the

forensic evidence cast in doubt, he sought to present credible evidence implicating White as the true perpetrator. But the trial court never gave petitioner the chance to tell the jury the second half of his story, without which the first half predictably lost almost all of its power to persuade. Juries expect parties to tell a story about what happened that makes sense, a story that possesses "narrative integrity." *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 183 (1997). If a party tells a nonsensical story, one lacking integrity, jurors are apt to be incredulous. Stories with big pieces missing – like the story petitioner here had no choice but to tell – make no sense.

The Supreme Court of South Carolina concluded that the trial court had properly excluded all of petitioner's evidence implicating White as the real killer. *Holmes*, 605 S.E.2d at 24. With respect to such evidence of third-party guilt, the court set forth the following rule for admission, drawn from a case decided in 1941:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence

> of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

State v. Gregory, 16 S.E.2d 532, 534-35 (S.C. 1941) (citing 16 C.J. 560).

The court then cited the holding of *State v. Gay*, 541 S.E.2d 541 (S.C. 2001): "[W]here there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Holmes*, 605 S.E.2d at 24. Applying the *Gregory-Gay* holdings, the court found that the forensic evidence pointing to petitioner's guilt – evidence whose reliability petitioner had vigorously contested and challenged throughout the trial – properly precluded the jury from even entertaining the substantial body of evidence he had amassed pointing to White's guilt and hence to his own innocence, evidence the trial court expressly found to be credible. Put simply: if a South Carolina trial court is unimpressed with a defendant's efforts to impeach forensic evidence against him, the court is free to exclude *all* evidence of third-party guilt from ever reaching the jury, no matter how compelling that evidence might otherwise be.

If this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), is still good law, the decision of the South Carolina Supreme Court in *Holmes* cannot be permitted to remain undisturbed. If any two cases are indistinguishable, these two are.

The defendant in *Chambers* was arrested for the murder of a local police officer, Aaron Liberty, after an ordeal outside a bar and pool hall. 410 U.S. at 285-86. The weapon used to kill Officer Liberty was a .22-caliber pistol. *Id.* at 286. Chambers was also shot during the incident. Three friends brought the wounded Chambers to a nearby hospital. *Id.* When police learned that Chambers had survived the shooting, he was arrested for the murder of the Officer Liberty. *Id.* at 287.

One of Chambers' three friends that night was a man named Gable McDonald. *Id.* at 286. Several days after the shooting, McDonald gave a sworn and voluntary confession to Chambers' attorneys that he – and not Leon Chambers – had shot Officer Liberty. *Id.* at 287-88. A month later, at Chambers' preliminary hearing, McDonald repudiated his prior sworn confession. *Id.* at 288. In fact McDonald testified that he had not even been at the scene of the shooting. *Id.* Instead, he claimed that he and Berkley Turner were having drinks nearby when they heard the shots. *Id.* He further explained that, though he did indeed own a .22-caliber pistol, he had lost it months earlier. *Id.*

At trial, Chambers tried to introduce evidence showing that McDonald had actually committed the crime. *Id.* at 289. Chambers called McDonald to the stand and successfully introduced McDonald's prior out-of-court confession into evidence. *Id.* at 291. On cross-examination by the state, McDonald testified that he had repudiated this confession. *Id.* Chambers then tried to challenge McDonald's renunciation, but was prevented from doing so when the trial court applied Mississippi's "voucher rule," which prevented a party from impeaching its own witness. *Id.* at 291-92.

Unable to directly challenge McDonald's renunciation of his prior confession, Chambers tried to introduce the testimony of three other witnesses to whom McDonald had confessed. *Id.* at 292-93. After telling the jury that neither he nor McDonald had been in the nearby café at the time of the shooting as McDonald had claimed, Berkley Turner would have told the jury that McDonald had confessed to him. *Id.* Sam Hardin and Albert Carter would also have testified to McDonald's confession. *Id.* But the jury heard none of this testimony, because all of it was excluded under Mississippi's hearsay rules. *Id.* at 293.

The application in this case of South Carolina's rule governing the admissibility of evidence of third-party guilt clearly violates *Chambers*. The facts in *Chambers* are materially indistinguishable from the facts here. In both cases the defendant asserted his innocence throughout. In both cases the third-party perpetrator presented an alibi that later turned out to be false. In both cases witnesses placed the third party in the vicinity of the offense. In both cases the third party had confessed to several people who proffered their testimony. In both cases the third party took the stand and repudiated these prior confessions. In both cases none of the witnesses to whom the third party had confessed was permitted to testify regarding the confession. If the facts in *Chambers* violated due process, then so too do the facts here.

The evidence excluded in *Holmes* was just as reliable and just as fundamental to the defendant's defense as was the evidence excluded in *Chambers*. Without that evidence, petitioner lost the "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). If no valid evidentiary reason existed to exclude the third-party evidence proffered in *Chambers*,

then no valid reason can exist to exclude the third-party evidence proffered in *Holmes*. Indeed, the exclusion of the third-party guilt evidence in *Holmes* was actually more detrimental to petitioner's defense than was the exclusion of the parallel evidence in *Chambers*. In *Chambers*, McDonald's prior written confession was introduced into evidence, as was other evidence implicating McDonald.[2] In contrast, the jury in *Holmes* heard *no evidence whatsoever* implicating White. Nor should it be forgotten that Chambers was sentenced to life imprisonment; the eighteen-year-old Holmes was sentenced to death.

The problem in *Holmes* is even worse than that in *Chambers* for yet another reason. The Court's opinion in *Chambers* makes no mention of the prosecutor's closing argument. Consequently, we have no idea what, if anything, the prosecutor said about Chambers' claim that McDonald was the perpetrator. In contrast, the prosecutor in *Holmes* first moved successfully to exclude petitioner's evidence of third-party guilt, and then mocked petitioner during closing argument for failing to come forward with witnesses to tell the jury who had committed the crime if not him. "[I]f [the police] are going to frame [someone] . . . , and it's going to be Bobby Holmes, where is this raping, murdering, beating fellow that actually did this thing?"

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[2] Mississippi law permitted Chambers to put on a great deal of evidence of McDonald's guilt. Hence Chambers offered the testimony of a lifelong friend of McDonald who said he saw McDonald shoot Liberty. And a cousin of Liberty "testified that he saw McDonald immediately after the shooting with a pistol in his hand." 410 U.S. at 391. Chambers also offered the testimony of a gun dealer who said that McDonald had bought a .22-caliber revolver of the sort used in the crime about a year before the murder and then bought a different style .22-caliber weapon three weeks after Liberty's death. 410 U.S. at 293 n.5

(Tr. 4220.) The prosecutor cynically asked the question knowing full well that he had taken steps to prevent petitioner from answering it. Such hypocrisy compounds the Due Process violation beyond the error that required reversal in *Chambers*. *Cf. Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam).

One obvious difference between the two cases is the basis upon which the third-party guilt evidence was excluded. In *Chambers* the evidence was excluded under Mississippi's voucher and hearsay rules, whereas in *Holmes* the trial court's exclusion was affirmed on the basis of the *Gregory-Gay* rule, which was specifically designed by the South Carolina courts to deal with third-party guilt evidence. But this difference cuts in favor of petitioner, not against him.

For one thing, despite the voucher and hearsay rules at issue in *Chambers*, Chambers was nonetheless able to present some evidence implicating McDonald, including McDonald's prior written confession. Not so under South Carolina's *Gregory-Gay* rule. Under that rule, any and all evidence of third-party guilt is properly excluded whenever the state's prima facie case can plausibly be characterized as a "strong" one.[3] For another, whereas the voucher and hearsay rules in *Chambers* at least had the virtue of applying equally to the state and the defense, the *Gregory-Gay* rule has the distinct vice of burdening only

[3] The forensic evidence of petitioner's guilt was by no means so strong as to bar his evidence of third-party guilt from raising a reasonable inference as to his own innocence. For petitioner had presented the jury with a single, coherent theory that would have destroyed the significance of all the forensic evidence offered against him, as the dissenting judge in *Holmes* recognized.

the defense. The state escapes its grip. Such asymmetry, the Court has noted, counts as another due process strike against a state evidentiary rule. *See, e.g.*, *United States v. Scheffer*, 523 U.S. 303, 316 n.12 (1998) (citing *Washington v. Texas*, 388 U.S. 14, 22-23 (1967)).

The *Gregory-Gay* rule, applied to the facts of *Chambers*, would have resulted in the exclusion of Chambers' third-party guilt evidence just as surely as did Mississippi's voucher and hearsay rules. The state in *Chambers* presented testimony from at least two deputy sheriffs at the scene of the shooting making Chambers out to be the shooter. *See* 410 U.S. at 286. Surely a trial court could find the eyewitness testimony of two law enforcement officers to be "strong evidence" of Chambers' guilt. If so, then under *Gregory-Gay*, Chambers could not have presented *any* evidence that someone else was the shooter, not even the evidence he was in fact allowed to offer under Mississippi law. The point bears repeating: Under the *Gregory-Gay* rule, once the state presents "strong evidence" of the defendant's guilt, evidence of third-party guilt can be excluded, *no matter how strong that evidence and no matter what the defendant has done to undermine the strength of the state's evidence*. Moreover, the *Gregory-Gay* rule imposes *no obligation whatsoever* on the trial court to assess the probative value of the third-party guilt evidence against any countervailing consideration, such as the risk of wasted time, jury confusion or unfair prejudice to the state. On the contrary, once the state has presented strong evidence of guilt, the defendant is *precluded without more* from mounting a defense based on evidence of third-party guilt, even if such evidence constitutes his best, or indeed his only, defense beyond simply casting doubt on the state's evidence.

A criminal defendant in South Carolina, whose fate for all practical purposes rests on his ability to present evidence that someone else committed the crime, stands no hope of success if the State can preclude such proof merely by persuading the trial judge that the defendant is probably guilty anyway. Under such circumstances the trial judge might just as well direct a verdict in the state's favor.

Holmes is indistinguishable from *Chambers*. Consequently, if the *Chambers* doctrine has any effect whatsoever beyond the facts in *Chambers* itself, the trial court's decision to exclude petitioner's proffered evidence violated Due Process. Petitioner's brief to the South Carolina Supreme Court fully addressed this *Chambers* claim, and he is entitled to the protection *Chambers* affords him. The South Carolina Supreme Court cannot be permitted to flout this Court's historic decision in *Chambers*.

B. The Court Should Grant Certiorari In Order To Clarify The Status And Scope Of The Rule Of *Chambers v. Mississippi*.

The South Carolina Supreme Court's application of the *Gregory-Gay* rule to the facts of petitioner's case plainly violates *Chambers*, whatever the scope of the Court's holding in that case. A grant of certiorari would therefore be warranted on this basis alone. In addition, however, the facts of petitioner's case raise more systemic concerns warranting the Court's attention.

Courts assess the admissibility of evidence of third-party guilt using a wide variety of different standards.

Some states admit evidence of third-party guilt only if it directly connects the third party to the offense charged.[4] Other states admit such evidence subject to an assessment of relevance and prejudice,[5] while others employ a balancing

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[4] *See, e.g.*, *Smithart v. State*, 988 P.2d 583, 586 (Alaska 1999) ("[E]vidence of the third party's guilt is admissible only if the defense can produce evidence that tend[s] to directly connect such other person with the actual commission of the crime charged") (internal quotation omitted); *Birmingham v. State*, 27 S.W.3d 351, 359 (Ark. 2000) ("A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party."); *People v. Yeoman*, 72 P.3d 1166, 1204 (Cal. 2003) ("[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.") (internal quotation omitted); *People v. Schwartz*, 678 P.2d 1000, 1009 (Col. 1984) ("[T]he defendant must first offer proof directly connecting the third person with the crime before evidence of that person's opportunity or motive to commit the crime becomes admissible."); *State v. Francis*, 836 A.2d 1191, 1199 (Conn. 2003) ("Third-party suspect evidence is admissible if it *directly* connects the third party to the crime."); *State v. Davidson*, 982 S.W.2d 238, 242 (Mo. 1998) ("Evidence that another person had an opportunity or motive for committing the crime is not admissible without proof that the other person did some act directly connecting that person with the crime.").

[5] *See, e.g.*, *State v. Wilson*, 406 N.W.2d 442, 447 (Iowa 1987) ("The evidence [of third-party guilt] has little or no probative value, but would be highly prejudicial to the State if admitted."); *State v. Fortin*, 843 A.2d 974, 1003 (N.J. 2004) (noting that the trial court properly excluded defendant's evidence that the victim sold drugs the day she was killed to imply that her death was drug related and committed by a third party on the grounds that it was irrelevant); *People v. Primo*, 753 N.E.2d 164, 166-67 (N.Y. 2001) (noting that a ballistics report was relevant evidence insofar as it linked a third person to the offense); *State v. Holterman*, 687 P.2d 1097, 1101 (Or. App. 1984) ("Defendant's testimony only marginally tended to show that another person may have had a motive to commit the crimes . . . [and a]ny probative value was far outweighed by the potential of that testimony to mislead the jury."); *State v. Wright*, 817 A.2d 600, 610 (R.I. 2003) ("[E]vidence of a third person's potential motive or opportunity to commit the crime must

(Continued on following page)

test weighing the interests of the defendant to present a defense and the interests of the state to administer fair and reliable trials.[6] Still other states impose a "reasonable doubt" test, evaluating whether the evidence is of sufficient value to raise a reasonable doubt as to the defendant's guilt.[7] Compared to each of these alternative rules, South Carolina's *Gregory-Gay* rule is the most unforgiving of all, for it permits a trial court to declare a defendant's third-party guilt evidence insufficient as a matter of law to raise a reasonable doubt as to the defendant's guilt once the court deems the state's evidence of guilt sufficiently weighty.

The sheer number of reported cases dealing with the admission of third-party guilt evidence suggests the issue is one arising with some regularity. *See, e.g.*, David McCord, *"But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered By a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 TENN. L. REV. 917 (1996) ("[T]here is a voluminous body of case law dealing with the admissibility of evidence offered by a criminal defendant to prove that some other person committed the offense with which the defendant is charged."). Just as regularly, however, the courts adjudicate the

not lead to jury speculation nor improperly open up collateral matters.").

[6] *See, e.g.*, *State v. Luna*, 378 N.W.2d 229, 234 (S.D. 1985) ("[W]e . . . balance the equation . . . by giving due weight to the substantial state interest in preserving orderly trials, and judicial sufficiency, and in excluding unreliable or prejudicial evidence.").

[7] *See, e.g.*, *State v. Conlogue*, 474 A.2d 167, 172 (Me. 1984) ("[E]vidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability.").

admissibility of such evidence without reference or regard to constitutional concerns, not to mention this Court's decision in *Chambers*. Indeed, the cases leave the distinct impression that in the minds of many courts *Chambers* is simply irrelevant to the decision at hand. The courts tend by and large to apply the jurisdiction's applicable rule of evidence and then move on as if *Chambers* had never been decided.[8] For example, in *none* of the cases decided by the South Carolina Supreme Court involving the admissibility of evidence of third-party guilt has the court once even mentioned *Chambers*, not even in passing.[9]

[8] Few states ever discuss *Chambers* beyond its broad proposition that defendants have a right to present a complete defense. Yet, with respect to the admission of evidence of third-party guilt, New Jersey is alone in its attempt to couch third-party guilt evidence as ultimately a matter of the *Chambers* due process right. *See State v. Koedatich*, 548 A.2d 939, 976 (N.J. 1988) ("[T]he Supreme Court [in *Chambers*] recognized that an accused has a constitutional right under the due process clause of the fourteenth amendment to offer probative evidence tending to show that a third party committed the crime charged."); *see also*, *State v. Reed*, 753 A.2d 1247, 1248 (N.J. 2000) (quoting *Koedatich*); *State v. Fulston*, 738 A.2d 380, 384 (N.J. 1999) (same). In other states, where *Chambers* was cited in third-party guilt cases, the claims were either rejected with little discussion, *see, e.g.*, *State v. Lewis*, 717 A.2d 1140, 1152 (Conn. 1998) (rejecting *Chambers* claim because defendant did not show the third party was unavailable), or the state evidentiary rule did not go so far as to violate the due process right because the court believed the evidence would simply confuse the jury. *See, e.g.*, *Snyder v. State*, ___ So.2d ___, 2003 WL 22463403, at *33 (Ala. Crim. App. 2003) (following *Chambers* but only to the extent that the defendant has a "probative alternative theory of culpability and not an alternative theory that is merely speculative and meant only to confuse the jury") (internal quotation omitted).

[9] *See State v. Gay*, 541 S.E.2d 541 (S.C. 2000); *State v. Beckham*, 513 S.E.2d 606 (S.C. 1999); *State v. Williams*, 468 S.E.2d 626 (S.C. 1996); *State v. Parker*, 366 S.E.2d 10 (S.C. 1988); *State v. Gregory*, 16 S.E.2d 532 (S.C. 1941).

Lower court disregard of, and sometimes for, *Chambers* rests at least in part on the uncertain status and scope of the holding in *Chambers* itself. On the one hand, the Court has continued to invoke and rely on *Chambers* in subsequent cases. Although the Court has never again applied *Chambers* in the context of a case involving the admissibility of evidence of third-party guilt, it has cited *Chambers* in a number of other cases, thus suggesting that the decision has force and application extending to some degree or another beyond the facts in *Chambers* itself. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1987) (holding that a rule which excluded all hypnotically refreshed testimony prevented the defendant from fully testifying on his own behalf); *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding the state's exclusion of evidence regarding the circumstances of the defendant's confession deprived the defendant the right to a fair opportunity to present a defense); *Green v. Georgia*, 442 U.S. 95 (1979) (finding the exclusion of a co-defendant's inculpatory statement under state hearsay rules deprived the defendant a fair opportunity to present a defense).

On the other hand, the Court has at the same time suggested that *Chambers* is not to be applied outside the factual context presented in that case. For example, in *Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality opinion), a plurality of the Court said that "*Chambers* was an exercise in highly case-specific error correction." *Id.* at 52. More recently, the Court emphasized that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case." *Scheffer*, 523 U.S. at 316. Indeed, *Chambers* itself seemed to go out of its way to suggest that the result it reached was *sui generis*, destined never to be repeated. 410 U.S. at 302-03.

The Court should not continue to countenance such debilitating uncertainty, especially with respect to the status and scope of so foundational a decision. The Court's persistent mixed signals do a disservice to the lower courts, which are left in desperate need of this Court's authoritative guidance. Accordingly, a grant of certiorari is warranted in order to settle whether *Chambers* should be understood as nothing more than an exercise in error correction, as some of the Court's post-*Chambers* cases say, or whether it instead should be understood as articulating a principle of constitutional law applicable outside the factual context presented, as some of its other post-*Chambers* cases can be fairly read to suggest.

Moreover, if *Chambers* did indeed articulate a principle of constitutional law, the Court should take the occasion to clarify the content of that principle. For example, if *Chambers* stands for the proposition, as some of this Court's post-*Chambers* cases suggest, that the application of a state evidentiary rule cannot exclude competent and reliable evidence without a "valid justification," *Crane*, 476 U.S. at 690, or without a "sufficient justification," *Egelhoff*, 518 U.S. at 62 (O'Connor, J., dissenting), then the lower courts need additional guidance to determine if and when their respective rules governing the admissibility of evidence of third-party guilt or the application of such rules lack the requisite – but so far ill-defined – justification. Without additional guidance from this Court, the predictable result will be continued and needless chaos, with the cost of that chaos falling squarely on the shoulders of criminal defendants like petitioner. Some courts will do their best to discern *Chambers*' tea leaves, while others will feel at liberty to ignore it with relative impunity, as did the Supreme Court of South Carolina in this case.

IV. CONCLUSION

In addition to the reasons presented by petitioner, the petition for writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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APPENDIX

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